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July 26, 2004

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *NeuStar Request (CC Docket No. 92-237)*

Dear Ms. Dortch:

This letter is filed on behalf of Syniverse Technologies ("Syniverse") in response to NeuStar Inc.'s ("NeuStar") letter, dated July 13, 2004[1] in the above-referenced proceeding. In response to numerous concerns by parties commenting in this matter that NeuStar's lack of detailed information about the IPO should raise concern at the Commission as to how such a transfer of ownership could assure neutrality, NeuStar's most recent filing has finally provided some detail about NeuStar's plans in this regard. While this information is certainly helpful to an analysis of NeuStar's request on some level, Syniverse respectfully submits that NeuStar continues to miss the most crucial issues for resolution in this proceeding.

From Syniverse's perspective, while NANPA neutrality is extremely important,[2] the principal issue presented by NeuStar's request for relief is *not* whether there are circumstances under which the NANPA contract can be awarded to a publicly traded company or whether, with appropriate ownership restrictions in place, a publicly traded NANPA can fulfill reasonable neutrality requirements. Rather, the two most critical issues here are: (1) how severely the integrity of the Commission's procurement process will be damaged in the future if a fundamental principle on which bidders were asked to evaluate the procurement is lifted, in its entirety, after the contract has been awarded; and, (2) if the restriction is lifted, whether the increased value of the NANPA contract unfettered by the transfer pre-approval restrictions can be retained by NeuStar, its management and shareholders, or instead must be captured for the government and the industry in a re-procurement of the NANPA role after the pre-approval

[1] Letter from Richard E. Wiley, counsel to NeuStar, to Marlene H. Dortch, FCC Secretary, CC Docket No. 92-237 (filed July 13, 2004) ("NeuStar July 13 letter").
[2] As discussed in more detail below, Syniverse believes that the Commission also should ensure that, if the NANPA is permitted to conduct an IPO, its post-IPO structure continues to meet high neutrality standards.

requirement has been rescinded. Both good policy and federal procurement law compel a re-procurement if the restriction is lifted.

When the FCC issued a request for proposals ("RFP") for the NANPA less than two years ago, all bidders were required to certify that they would comply with certain neutrality and conflict of interest requirements, including transfer pre-approval requirements.[3] NeuStar won the NANPA contract, which has a term of one year with four one-year renewal options. NeuStar now wishes to conduct an IPO, which would conflict with the pre-approval requirements.

As previously noted, Syniverse has no objection to NeuStar conducting an IPO, nor does Syniverse object to the Commission deciding that the pre-approval requirements of most concern to NeuStar can be loosened to encourage participation in the process of NANPA selection by publicly traded entities or entities who desire to raise capital through an IPO. But it would be contrary to both law and good policy for the Commission to renew NeuStar's *current* NANPA contract *and* change the rules applicable to the NANPA without capturing the benefits of that rule change for the government and the industry (that pays for numbering administration) via a new procurement. And the record in this proceeding makes clear that if the pre-approval requirement had not been imposed on bidders in the NANPA procurement, more bidders would have participated, and the higher number of bidders and greater ownership flexibility would have led to greater value to the government and the industry.

Indeed, NeuStar's letter confirms this by arguing that a publicly owned NANPA will expand competition for FCC contracts, such as the NANPA contract:[4]

> Permitting NeuStar to become a public company will strongly highlight that public companies can successfully assume such roles, possibly generating more interest by public companies in *future* contracts with similar neutrality requirements. As such, competition for *future* FCC contracts should be broadened, with the Commission able to consider a broader range of qualified applicants *and the public reaping the benefits*.[5]

The question presented here is merely who should obtain the increase in value in the current NANPA contract if the change is made; as Syniverse has noted in its filings, and contrary to NeuStar's suggestion, the Commission need not wait for *future* contracts for the public to reap the benefit of the proposed rule change. To the contrary, there is no public policy justification for allowing NeuStar (and its management and future shareholders) to obtain a windfall value which should rightly accrue to the government and the industry when the Commission has it within its power to capture it for the public simply by declining to renew the one-year agreement with those changes, and instead re-bidding it.

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[3] *See* Syniverse Opposition, CC Docket No. 92-237 (filed May 12, 2004) at 2-3.
[4] NeuStar July 13 letter at 6-7.
[5] *Id.* (emphasis added).

From a policy perspective, the Commission would utterly undermine the integrity of its procurements if it relieved a winning bidder of a restriction that materially influenced the value of the award without any evidence that the bidder needs such relief in order to perform its contractual obligations. Incredibly, NeuStar effectively acknowledges its low regard for the ground rules established in FCC procurements when it states that "*any* entity awarded the NANPA contract could have sought the relief that NeuStar is now seeking."[6] Accepting this position would create a situation where the value of FCC contracts would not be set by the criteria and description in the RFP, but by the bidders' confidence in their (or their counsel's) ability to change the rules after an award in order to capture the real contract value for itself. It must be emphasized in this case that NeuStar has not claimed, nor submitted a single shred of evidence suggesting, that the proposed IPO is necessary for it to fulfill its responsibilities as NANPA. To the contrary, NeuStar's pleadings and letters in this case make clear that the additional capital they seek to raise in an IPO will go to enhance the wealth of its early investors and management and allow it to pursue *other* other, ancillary lines of business.[7] The public interest can only be served in this situation by a strong reassertion that the Commission will stand by the basic principles that establish the value of the opportunities being bid in its procurements.

NeuStar's proposal is not only bad policy; it also flies in the face of federal law. Under federal procurement precedent, agencies cannot exercise an option to renew a contract if, as here, the best value for the government can be obtained by conducting a new procurement. Here again, NeuStar's attempt to justify its position by reference to procurement laws misses the crucial issue. In both its reply comments and its July 13 Letter, NeuStar asserts that the "limited relief NeuStar seeks…does not rise to the level of an out-of-scope-modification that would require rebidding of the NANPA or the Pooling contract" because the requested relief "merely pertains to the administration of the contract" and "in no way effects the contractual obligations set forth in the contracts."[8] The proper inquiry, however, is *not* whether the relief requested is an out-of-scope modification to the NANPA contract, but rather whether the Commission may exercise its option to extend the contract if the requested relief is granted. In fact, section 17.207 of the Federal Acquisition Regulation ("FAR") regarding the exercise of options,[9] as interpreted by the relevant Federal procurement authorities, requires that the Commission issue a new solicitation, rather than exercise the option, if NeuStar's requested relief is granted.

Section 17.207(c) provides that a contracting officer may exercise an option only after determining, *inter alia*, that "[t]he exercise of the option is the most advantageous method of fulfilling the Government's need, price and other factors (see paragraphs (d) and (e) of this section) considered." Pursuant to section 17.207 (d), a determination that exercising an option is

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[6] *Id.* at 10 (emphasis in original).
[7] Indeed, the 2003 NANPA Performance Evaluation Report from the NANC-NOWG, CC Docket No. 99-200 (filed July 14, 2004), found that NeuStar is performing its NANPA duties at a level between "more than met" and "exceeded" expectations – while conforming to the current requirements.
[8] NeuStar Reply at 11-13; July 13 Letter at 9-10.
[9] 48 C.F.R. § 17.207.

the most advantageous method of fulfilling the Government's need must be based on one of the following findings:

- A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. FAR §17.207(d)(1).

- An informal analysis of prices or an examination of the market indicates the option price is better than prices available in the market or that the option is the more advantageous offer. FAR §17.207(d)(2).

- The time between award of the contract containing the option and the exercise of the option is so short that, considering such factors as market stability the option price will be the lowest price obtainable or the more advantageous offer. FAR §17.207(d)(3).

Interpreting these procurement regulations, the Federal Government's primary procurement protest authority, the Government Accountability Office (formerly the General Accounting Office) ("GAO"), long has emphasized that the determination of whether exercising an option is in the best interest of the government must "be made each time an option is exercised, taking into account the particular circumstances existing at the time."[10] Similarly, the GAO has found exercise of an option improper where the agency did not take into account changes in the marketplace or that lower prices would be available under a new solicitation.[11]

The NANPA contract currently is in Option Year 1, which will expire at the end of 2004.[12] Consistent with section 17.207(c), therefore, before exercising its option to extend the period of performance for Option Year 2, the Commission's contracting officer must determine that such action is the most advantageous method of fulfilling the Government's need. If the Commission releases the NANPA from the pre-approval requirement, however, the value of the NANPA contract will change. As a result, the contracting officer will be unable to make the findings specified in section 17.207(d). As discussed above, Syniverse has shown and NeuStar has conceded that allowing the NANPA to be publicly traded will increase competition for the NANPA role, and better prices and/or more advantageous offers will be the probable result. Thus, it is impossible to find that the option price is better than prices available in the market or that the option is the more advantageous offer. Also, more than 18 months have passed since the NANPA contract was awarded, and thus the period of time between award and any exercise of Option Year 2 is not "short." Therefore, none of the conditions in section 17.207(d) is satisfied to permit the exercise of the option.

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[10] *AAA Eng'g and Drafting, Inc.*, B-236034.2, Mar. 26, 1992, 92-1 CPD ¶ 307, at 3.
[11] *Id. See also Banknote Corporation of America, Inc.*, B-250151, Dec. 14, 1992, 92-2 CPD ¶ 413.
[12] The RFP suggests that each renewal term is 13 rather than 12 months, but this appears to be an error.

In sum, there is neither a policy basis nor any legal basis for the Commission to grant NeuStar the requested relief. To the contrary, unless NeuStar is willing to carry out its contractual obligations under the restrictions it accepted in the NANPA procurement, it is incumbent upon the FCC not to renew the contract at the conclusion of the current option year; assuming that the FCC is willing to lift the pre-approval transfer restrictions in order to allow the NANPA to engage in an IPO or otherwise to allow the ownership of publicly traded entities, then it should do so for the next and future NANPAs awarded under a new RFP.

Finally, if the Commission chooses nevertheless to grant NeuStar's requested relief, Syniverse does not believe that NeuStar has adequately responded to concerns about aggregate telecommunications service provider ("TSP") interests. NeuStar attempts to distinguish the *DSMI Order*[13] as involving "a unique situation where a company derived a majority of its revenues from one entity, which was wholly owned and controlled by the Bell Operating Companies *collectively*."[14] The issue in the *DSMI Order* was whether a group of TSPs (the BOCs) could be found to have interests that were so closely aligned that they could be treated as a single telecommunications provider for purposes of the neutrality rules.[15] NeuStar offers no explanation for its bald statement that "[i]ndividual investments in NeuStar by separate TSP interests (as opposed to through a collectively owned entity) would not raise the same concerns."[16] There is no indication that the fact that the BOC revenue flowed to DSMI through the commonly owned Service Management Team ("SMT") was in any way central to the Commission's decision there. As Syniverse has shown, NeuStar has proposed no safeguards to prevent a group of like-minded carriers from each buying an amount of stock just below the threshold, and effectively exercising control over NeuStar's management or board.[17]

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[13] *Toll-Free Service Access Codes; Database Services Management, Inc. Petition for Declaratory Ruling; Beehive Telephone Co. Petition for Declaratory Ruling*, 15 FCC Rcd 11939 (2000) *("DSMI Order")*.
[14] NeuStar July 13 letter at 7.
[15] *DSMI Order*, 15 FCC Rcd at 11948.
[16] NeuStar July 13 letter at 7.
[17] *See* Letter from L. Charles Keller, counsel to Syniverse, to Marlene H. Dortch, FCC Secretary, CC Docket No. 92-237 (filed June 28, 2004) at 2-3.

Syniverse believes that the true choice here must be NeuStar's, and not the Commission's. Nothing prevents NeuStar from continuing as NANPA under the current rules; it has suggested no financial hardship directly related to its NANPA performance. Thus, NeuStar has two avenues open to it: It can either choose to abide by the ground rules of the procurement in which it won the NANPA contract or, if those rules are too burdensome for its *other* business plans, it can continue to pursue the requested rule changes, with the knowledge that the Commission will be unable to exercise the option consistent with section 17.207 of the FAR. On the other hand, for the Commission to exercise its option to renew the contract at the current price under more valuable terms, and cede to NeuStar value that rightly should accrue to the government and the industry, would violate both federal procurement law and the public interest, and therefore NeuStar's request must be rejected.

Sincerely,

WILKINSON BARKER KNAUER, LLP

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